Nos. 77-498 and 77-538

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

MANUEL ALFONSO RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND GERALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a)[1] is reported at 556 F. 2d 638.

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[1]"Pet." refers to the petition for a writ of certiorari filed by petitioner Rodriguez, No. 77-498, upon which petitioner Geraldo, No. 77-538, wholly relies. "App." refers to the Appendix filed by petitioner Rodriguez in the court of appeals, a copy of which we are lodging with this Court, and "Tr." indicates the trial transcript.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1977. Petitions for rehearing were denied on August 30, 1977. The petitions for a writ of certiorari were filed on September 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was legally sufficient.

2. Whether petitioners' claims of prosecutorial misconduct were properly rejected by the court below.

3. Whether the jury's verdict was based on sufficient and properly admitted evidence.

4. Whether petitioner Rodriguez was deprived of the effective assistance of counsel.

5. Whether the district court's jury instructions were proper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy (18 U.S.C. 371) to file false documents with the United States Department of State in violation of the Gun Control Act of 1968 (Count One), and of substantive counts charging the filing of false documents with the State Department, in violation of 18 U.S.C. 1001 and 2. In addition to the conspiracy count, petitioner Geraldo was convicted on three substantive charges and petitioner Rodriguez on one (Count Three).[2]

[2]The district court dismissed Counts Two and Four with regard to Rodriguez at the close of the government's case-in-chief. Each of the five other co-defendants pleaded guilty to one of these charges prior to or at the trial.

The district court sentenced Geraldo to concurrent terms of four years' imprisonment on each of the four counts; Rodriguez was sentenced to two consecutive five-year terms of imprisonment. The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial revealed that petitioners were involved in an illegal scheme to sell submachine guns to buyers in this country by filing fraudulent documents with the State Department designed to create the impression that the weapons were being lawfully exported to a foreign government. Three false documents were submitted to the State Department on May 5, 1976, in support of an application for a license to export 10,000 submachine guns to the government of El Salvador. They included an "end use certificate,"[3] a purchase order, and a State Department application form "DSP-5."

The evidence showed that petitioner Geraldo played an instrumental part in getting Rodriguez, the Chief of Staff of the Armed Forces of El Salvador, to carry out the scheme. After meeting with supposed purchasers of the weapons (including several undercover agents), Geraldo represented that he could bribe connections in Central America to supply necessary documentation (Tr. 112-116, 196-200). At later meetings, he discussed the mechanics of the transaction with the agents (Tr. 120-121, 209-212) and, after first indicating that a Guatemalan official would provide the documentation (Tr. 241-242), subsequently stated that petitioner Rodriguez had agreed to assume that role (Tr. 250-251). Later, petitioner Geraldo

[3]An "end use certificate" must be submitted to the State Department in support of an application for a munitions exporting license. The certificate must be executed by a responsible agent of the foreign government and must attest to the ultimate use to which the requested arms will be put.

introduced co-defendant Miguel Celis, the personal representative of petitioner Rodriguez, to the agents and also helped to prepare the needed documents (Gov't. Ex. 31; Tr. 263-264, 271-272, 605-609).

For his part, petitioner Rodriguez agreed to supply an "end use certificate" for 10,000 submachine guns in exchange for $75,000 (Tr. 250-251). On May 15, 1976, Rodriguez and Celis arrived in Mount Kisco, New York, to deliver additional necessary documentation. Shortly after this final meeting, at which Special Agent Joseph F. Kelly of the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms gave Rodriguez and Celis the $75,000 cash that they were to receive for this transaction, all the defendants were placed under arrest (Gov't. Exs. 28A, 28B, 28C; Tr. 308-312).

In a post-arrest statement, Rodriguez stated that he had gone to Mount Kisco to meet with his wife, that he was paid the $75,000 as an act of good will, and that he had received the $75,000 for having signed a petition to the State Department for the export of five guns to his country, for which his country was to pay nothing (Defendant's Ex. A; App. 87SA-96SA).

Special Agent Kelly was the chief witness for the government at trial. He testified about the meetings with the defendants that he had attended in an undercover capacity, all of which were tape recorded. A videotape was made of the final meeting attended by Kelly, at which petitioner Rodriguez accepted the $75,000 payment.

ARGUMENT

1. Petitioners argue (Pet. 63) that the indictment is fatally defective because it fails to explain why the three documents submitted to the State Department on May 5, 1976, were false and because it fails to identify how these

false statements were "material and capable of influencing" the State Department. Petitioners also contend (Pet. 61-62) that Count Three of the indictment does not allege a crime because it utilizes the word "facilitate," which does not appear in the text of either of the applicable criminal statutes (18 U.S.C. 1001 and 2). These contentions were not raised in the district court, and, to the extent that petitioners do not assert that the indictment failed to state an offense, the court of appeals correctly held (Pet. App. 5a) that they are barred by Rule 12(b)(2), Fed. R. Crim. P. In any event, the attacks on the indictment are without merit.

The substantive counts of the indictment (Counts Two, Three, and Four) expressly charge that each document filed at the State Department contained a representation that 10,000 submachine guns were being purchased by the government of El Salvador for its national defense, when in fact the defendants knew this representation to be false. Contrary to petitioners' allegations, therefore, the language of the indictment specified the falsity of these documents with more than sufficient particularity. In addition, it is sufficient to allege, as the instant indictment did, that the false statements were submitted "in any matter within the jurisdiction" of a federal agency. *United States* v. *Adler*, 380 F. 2d 917, 920-922 (C.A. 2), certiorari denied, 389 U.S. 1006. It is not necessary that the indictment further specify the extent to which the false statement might influence the agency in making its decision.[4]

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[4]Since the State Department requires an "end use certificate" specifying the use to which the foreign government will put the requested arms (see note 3, *supra*), there can be little doubt in the present case of the materiality of the false statements.

Nor is Count Three rendered insufficient because it uses the word "facilitate." As the court of appeals noted (Pet. App. 5a), inclusion of the word was "mere harmless surplusage" because the verb is used in conjunction with, and not as an alternate to, other verbs directly quoted from the statute. In express terms, Count Three charges that petitioners did "willfully * * * cause" an illegal act to be done, which is the precise language of 18 U.S.C. 2(b).

2. Petitioners argue that the case was presented on "false testimony and false evidence knowingly and deliberately introduced at trial by the prosecution" (Pet. 37-38) because the government introduced the "end use certificate" referred to in Count Three as an exhibit at trial and before the grand jury, knowing "that Miguel Celis * * * had *traced* the name of Rodriguez thereon" (*id.* at 38; emphasis in original). To show further governmental misconduct, petitioners also contend (Pet. 57-61, 67) that the prosecution, in its summation, erroneously referred to matters outside the record and improperly alluded to the failure of the appellants to testify. These claims find no support in the record.

The claim that the prosecution advanced the false theory that Rodriguez actually signed the end use certificate is directly contrary to the representations of government counsel at trial. The United States Attorney expressly stated to both the district court and defense counsel during the trial that the government did not claim that Rodriguez had personally signed the document (Tr. 256).[5] Moreover, the jury was expressly told in the

[5]The government did claim that the signature had been placed on the "end use certificate" with Rodriguez' full knowledge and authorization (Tr. 256). The good-faith basis for that claim is contained in the grand jury testimony of co-defendant Celis, which was submitted under seal to the district court in response to an unsuccessful post-trial motion raising these same allegations of misconduct.

government's summation that the government did not claim that Rodriguez signed the end use certificate (Tr. 764). Indeed, this concession was seized upon by Rodriguez' trial counsel, who argued in summation that Rodriguez was obviously innocent since it had been necessary "to forge or trace" his signature (Tr. 806).[6] As the court of appeals observed (Pet. App. 6a): "No reasonable person could doubt that the prosecution's consistent position was that Rodriguez' name on the certificate was there with his full knowledge and authorization, but not as a result of his penmanship."

Petitioners' allegations of prosecutorial misconduct based upon arguments made during summation are also unsupported. To begin with, we note that petitioners made no objection to these arguments at trial. Moreover, although petitioners now assert that the government "introduc[ed] to the jury matters that were not in evidence" (Pet. 59), an examination of these charges shows that in each instance the prosecutor merely made simple inferences from the facts in evidence. See *United States* v. *Steinberg*, 551 F. 2d 510, 515 (C.A. 2).

Similarly, petitioners' charge that the government continually referred to "undisputed" evidence, and so commented unfairly on petitioners' failure to take the stand, is undercut by the fact that in each of the statements so challenged, the United States Attorney was merely commenting that he believed his assessment of the

[6]Petitioners' claim that the government violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83, by not disclosing to the defense that "Miguel D. Celis had forged the signature of Rodriguez" on the end-use certificate (Pet. 41) carries little weight, since defense counsel conceded to the district court that he had already been told that Rodriguez' signature had been placed on the document by someone else (Tr. 720).

evidence would not be disputed by defense counsel in their summations (*e.g.*, Tr. 737-738). In any event, when the credibility or sufficiency of the government's evidence has been attacked, the prosecutor may properly assert in summation that factual matters are "unrebutted" or "uncontradicted" (*United States* v. *Rodriguez*, 545 F. 2d 829, 832 (C.A. 2), certiorari denied, 429 U.S. 1063; see *Lawn* v. *United States*, 355 U.S. 339, 359-360 n. 15), and nothing in the summation was " 'of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " *United States* v. *Williams*, 521 F. 2d 950, 953 (C.A. D.C.), quoting from *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10).[7]

Finally, there is no basis for petitioners' objection (Pet. 59, 67) to the government's argument that agent Kelly had employed proper undercover techniques in the investigation of this case. Throughout his cross-examination of Agent Kelly, trial counsel for petitioner Geraldo repeatedly insinuated (a) that the agent had enlisted the services of underworld criminals (Tr. 354, 367, 415); (b) that thorough investigative techniques had not been followed by government agents (Tr. 383, 414); and (c) that undercover agents had threatened some or all of the defendants (Tr. 394). In summation, he accused the government of "selective prosecution" (Tr. 783) and of conducting Orwellian surveillance upon the defendants (Tr. 786). In addition, Rodriguez' trial attorney, in his closing remarks, characterized the efforts of Agent Kelly and his fellow agents as "sloppy investigative work" and urged the jury to "protect yourselves and us from that kind of work" (Tr. 812). Consequently, "in the context of

[7]We do not believe, therefore, that it is necessary for the Court to defer consideration of this petition pending disposition of *Lockett* v. *Ohio*, No. 76-6997, certiorari granted, October 11, 1977.

the trial and balanced against the tactics of the defense lawyers," the comments of the United States Attorney in summation constituted a permissible attempt to offer a rebuttal. *United States* v. *Tramunti*, 513 F. 2d 1087, 1119 (C.A. 2), certiorari denied, 423 U.S. 832.

3. Petitioners advance various claims that the evidence adduced at trial was either inadmissible, unconstitutionally obtained, or insufficient. None of these claims withstands analysis.

a. Rodriguez alleges (Pet. 48-55) that the videotape of his May 15, 1976, meeting in Mount Kisco (Gov't. Exs. 28A, 28B) and his post-arrest statement (Defendant's Ex. A) should have been suppressed by the district court under authority of *Miranda* v. *Arizona*, 384 U.S. 436. However, Rodriguez did not object either before or during trial to the offer of either exhibit into evidence; indeed, he joined in the government's offer. Thus he is precluded from objecting to this evidence on appeal. Rule 12(b)(3), Fed. R. Crim. P.

Even if Rodriguez had interposed timely objections, he would not have been entitled under *Miranda* to have either the videotape or his post-arrest statement excluded. There was no constitutional requirement that the undercover agents advise Rodriguez of his *Miranda* rights during the videotaped meeting, since Rodriguez was not in custody at any time during the meeting. *Oregon* v. *Mathiason*, 429 U.S. 492, 495. Where the suspect is not even aware that he is in the presence of law enforcement officers, as was the case here, *Miranda* does not apply. *Beckwith* v. *United States*, 425 U.S. 341, 347. Although *Miranda* would be applicable to his post-arrest statement, it is evident from the statement itself that Rodriguez was properly and timely advised of each of his *Miranda* rights

and that he voluntarily agreed to continue answering questions, even after being told that he could "stop at any time" (App. 87SA).[8]

b. Petitioners contest the admission into evidence of the various audio tape recordings made during the undercover negotiations on the ground that they were obtained "without any Warrant" (Pet. 66), and they challenge the admission of the submachine gun (Gov't. Ex. 7) that was demonstrated in North Carolina for co-defendant Dominick Cagianese and the undercover agents, on the ground that it was introduced solely to "inflame the jury" (Pet. 65). The admission of these exhibits was, however, clearly proper.

The warrantless recording of an oral communication violates neither the Constitution nor federal law when it is made with the consent of one of the parties to the communication. See 18 U.S.C. 2511(2)(c) and *United States* v. *White*, 401 U.S. 745. As the audiotapes introduced into evidence at the trial were all recorded with the knowledge and consent of Agent Kelly, who was present during all of the recorded meetings (Transcript of *Voir Dire*, dated September 20, 1976, at 8), petitioners cannot complain that a warrant was not obtained.

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[8]Petitioner Rodriguez' assertion that at some unspecified time and place he had asked for permission to make telephone calls to "[the] president of the Republic of El Salvador, the Defense Minister, the Ambassador, and the United States Armed Forces Chief of Staff" (Pet. 54) finds no support whatever in the record. After being advised in Spanish that "[i]f you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed," Rodriguez did not request an attorney but continued to answer the questions put to him (App. 87SA).

The admission into evidence of the demonstration model of the submachine gun was also proper, since it was plainly relevant to the issues at trial and carried little risk of serious prejudice to petitioners. The weapon served as physical evidence corroborating Agent Kelly's testimony about the test demonstration in North Carolina, and proof of its physical characteristics as an "automatic weapon" helped to show that one of the objectives of the conspiracy was to violate the Gun Control Act of 1968. On the other hand, the defendants could hardly have suffered any genuine prejudice from the introduction of a single gun into evidence (which the jury was never permitted to touch or view from a near distance (Tr. 236), since the charges against petitioners involved a plan to sell 10,000 times that number on the basis of false documentation. Under the circumstances, the trial court plainly did not abuse its discretion in admitting the submachine gun into evidence.

c. Rodriguez relies on *Bruton* v. *United States*, 391 U.S. 123, to support his contention that the introduction of "mountains of hearsay" deprived him of a fair trial (Pet. 64). However, *Bruton* concerned problems that arise where a co-defendant's out-of-court post-arrest statement inculpates another defendant and is admitted into evidence without the declarant being available at trial for full and effective cross-examination. See *Nelson* v. *O'Neil*, 402 U.S. 622, 627. Even assuming that Rodriguez raises this claim for the benefit of petitioner Geraldo (who incorporated those claims by reference), there were no such problems here, since Rodriguez' post-arrest statement (App. 87SA-96SA) did not mention Geraldo. The "hearsay" evidence offered at the trial—consisting of the tape recorded admissions of the defendants and the statements of co-conspirators in furtherance of the conspiracy—was relevant and admissible, notwithstanding

the fact that there was a great deal of it. Fed. R. Evid. 801(d)(2)(A) and (E); *Lutwak* v. *United States*, 344 U.S. 604, 617.

d. Rodriguez further claims that there was insufficient independent proof of his participation in the conspiracy because, while "[t]he conspiracy charged * * * had already been consummated as of May 5, 1976," he was not "in view at all" until May 15, 1976 (Pet. 57). However, the conspiracy was not consummated by the mere filing of the documents at the State Department on May 5, 1976, since its primary objective—to sell 10,000 submachine guns illegally—had not yet been attained. See *Grunewald* v. *United States*, 353 U.S. 391, 401-402. Consequently, evidence of Rodriguez' pre-arrest admissions and conduct at the videotaped meeting of May 15, 1976, was clearly admissible to prove his independent participation in the conspiracy charged in Count One. This evidence in turn was more than sufficient to warrant the introduction of his co-conspirators' hearsay declarations. See *United States* v. *Calabro*, 449 F. 2d 885, 889 (C.A. 2), certiorari denied, 404 U.S. 1047. Thus, the evidence fully supported the verdict of guilty on the conspiracy count.

4. Petitioner Rodriguez also claims (Pet. 41-48) that his retained attorney at trial was so incompetent as to deprive him of the effective assistance of counsel. The court of appeals correctly concluded (Pet. App. 7a), however, that this contention is without support in the record.

Petitioner Rodriguez first argues that his trial counsel failed to conduct a proper investigation to discover that the signature of Rodriguez on the end use certificate had been traced onto that document by co-defendant Celis, and that counsel did not oppose the introduction of this "false evidence" at trial (Pet. 42-44). The record demonstrates, however, that petitioner's counsel was well

aware that Celis had placed Rodriguez' signature on the certificate and that counsel did oppose the introduction of the certificate into evidence until he had been assured by the government that it would not contend that Rodriguez had actually signed the document (Tr. 253-257, 807).

Petitioner Rodriguez also claims that his counsel acted incompetently in failing to object to, or attempt to obtain a limiting instruction on, the videotape, audiotapes and "triple hearsay" testimony of Agent Kelly (Pet. 44). However, both the tapes and the agent's testimony contained the admissions of petitioner and statements of his co-conspirators made in furtherance of the conspiracy. The admission of this evidence is proper. Rule 801(d)(2)(A) and (E), Fed. R. Evid.[9] Similarly, petitioner's contention that his counsel was incompetent in not objecting to the indictment must fail because, as indicated above (pp. 5-6, *supra*), such an objection would have been frivolous.

The claim that counsel in his summation ineffectively argued Rodriguez' case to the jury (Pet. 44-45) is highly speculative. This kind of assertion affords no basis for relief unless it is demonstrable that the representation provided fell outside the "range of competence demanded of attorneys in criminal cases." *Tollett* v. *Henderson*, 411 U.S. 258, 268. No such argument can reasonably be made here.[10] Similarly, Rodriguez' objection to counsel's pretrial investigation and to his alleged failure adequately to

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[9]Moreover, a motion to suppress the tapes had been made at the start of the trial by the attorney for co-defendant Robert Michaelson. This motion, which was deemed by the district court to have been made by all defendants, was denied (Transcript of *Voir Dire*, dated September 20, 1976, at 8-12, 106).

[10]The district court was quite impressed by trial counsel's performance in this case. In a memorandum opinion filed on March

research the law applicable to this case are unsubstantiated assertions of facts outside the record and are therefore insufficient to raise even a colorable claim of ineffective assistance of counsel. *United States* v. *Wisniewski*, 478 F. 2d 274, 284 (C.A. 2).

5. Finally, petitioners claim that the district court failed to instruct the jury properly on conspiracy and on reasonable doubt (Pet. 56-57, 63-64).

Their first contention—that the district judge should have preliminarily charged the jury concerning the admissibility of co-conspirators' statements—was never brought to the district court's attention during the trial and, consequently, may not be raised on appeal. See Rule 30, Fed. R. Crim. P.; *United States* v. *Moore*, 505 F. 2d 620, 623-624 (C.A. 5), certiorari denied, 421 U.S. 918. Moreover, this claim overlooks the fact that the district court did give a preliminary warning to the jury that it was accepting hearsay testimony "subject to connection,"

11, 1977, denying Rodriguez bail pending appeal, the district judge wrote (slip op. 2-3):

> The final argument [of Rodriguez on appeal] apparently is a claim of incompetence by trial counsel for the defense. I have been around the federal courts for the past twenty years as prosecutor, defense attorney, Regional Administrator of the Securities and Exchange Commission, and as a judge, and I have never seen such a totally baseless and spurious claim. Trial counsel for Col. Rodriguez recognized that he was fighting an uphill battle, but conducted himself in a totally professional manner. His reputation for competence in this courthouse is of the highest order, and it is well merited. The attack on that reputation by appellate counsel can only be based upon a lack of understanding of the tactics and strategy of an able trial attorney.

and that at the end of the trial "[i]f there is no connection whatsoever, I want you to take out your mental erasers and forget it" (Tr. 65).[11]

Similarly unsupported is the challenge to the district court's reasonable doubt charge (App. 27A-29A), also raised for the first time on appeal. See *United States* v. *Acarino*, 408 F. 2d 512, 517 (C.A. 2), certiorari denied, 395 U.S. 961. The language in the district court's charge to which petitioners object,[12] when read in the context of

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[11] In its charge to the jury at the conclusion of the trial, the district court gave a full explanation of the requirement of independent evidence (App. 40A, 44A):

> I mentioned to you that certain evidence was taken subject to connection. I told you at the time I would explain it in detail to you.
>
> If you are satisfied beyond a reasonable doubt that a conspiracy existed and that a particular defendant was a member, then the acts and declarations of any other person whom you also find was a member of the conspiracy made during the existence of the conspiracy and in furtherance of its objects are the acts and declarations of all the members of the conspiracy, even though they were not present.
>
> • • • • •
>
> As I explained, statements and acts of a conspirator, of the alleged conspirator, each alleged conspirator, must be considered by you to determine whether he knowingly, wilfully and intentionally joined in the conspiracy, if you find one to exist.
>
> If you find that he did, then statements or acts of other proven co-conspirators can be considered only if in furtherance of and during the existence of the conspiracy. Proof of a subsequent statement is not and cannot be the substitute for proof of the crime charged in this indictment.

[12] "[N]ot proof to a positive certainty or beyond all possible doubt. If that were the rule, it would be practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to a mathematical computation. As a consequence, the law is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt" (Tr. 867).

the entire charge, *Cupp* v. *Naughten*, 414 U.S. 141, 146-147, more than adequately conveys the concept of reasonable doubt in language that has received repeated judicial approval. See, *e.g.*, *United States* v. *Barrera*, 486 F. 2d 333, 339 (C.A. 2), certiorari denied, 416 U.S. 940; *United States* v. *Kirk*, 534 F. 2d 1262, 1279 (C.A. 8). Further review of this issue is not warranted.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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